UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARDS CONSTRUCTION COMPANY-KANEOHE BAY PROJECT, BARRY J. RICHARDS CO., BAYRICH, INC., BAYRICH INC. OF CALIFORNIA, BARRY J. RICHARDS, INC., RICHARDS CONSTRUCTION COMPANY, MASSACHUSETTS BONDING AND INSURANCE COMPANY, BARRY J. RICHARDS, and GERTRUDE RICHARDS, Appellants, vs. AIR CONDITIONING COMPANY OF HAWAII, Appellee.	No. 17748

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF

HAWAII

BRIEF OF APPELLANTS

A. William Barlow
Gasco Building
Honolulu, Hawaii

Sandler & Rosen
435 North Bedford Drive
Beverly Hills, California

Attorneys for Appellants.

INDEX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARDS CONSTRUCTION COMPANY-KANEOHE BAY PROJECT, BARRY J. RICHARDS CO., BAYRICH, INC., BAYRICH INC. OF CALIFORNIA, BARRY J. RICHARDS, INC., RICHARDS CONSTRUCTION COMPANY, MASSACHUSETTS BONDING AND INSURANCE COMPANY, BARRY J. RICHARDS, and GERTRUDE RICHARDS, Appellants, vs. AIR CONDITIONING COMPANY OF HAWAII, Appellee.	No. 17748

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF

HAWAII

BRIEF OF APPELLANTS

Jurisdictional Statement

This is an appeal from a judgment entered on November 28, 1961, by the United States District Court for the District of Hawaii, in favor of the plaintiff below and appellee herein, Air Conditioning Company of Hawaii, against the defendants

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[illegible] CONSOLIDATED CHEMICAL-
[illegible] ELECTRIC RAY PRODUCTS, MARGE M.
[illegible] Company Co., Electric, Inc.,
[illegible] Electric Inc. Of California,
[illegible] Ray J. Kramer, Inc.,
[illegible] Coast Construction Company,
[illegible] Manufacturers Products and
[illegible] Corporation Company, Miles A.
[illegible], and Central Electric,

Appellants,

vs.

[illegible] CONSOLIDATED CONCRETE CO
[illegible],

Appellee.

No. 11744

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
HAWAII

BRIEF OF APPELLANTS

Jurisdictional Statement

This is an appeal from a judgment entered on November 20, [illegible], by the United States District Court for the District of [illegible], in favor of the plaintiff below and appellee herein, [illegible] Consolidated Company of Hawaii, against the defendants

below and appellants herein, in the sum of $11,417.00, with interest at 6% from July 25, 1960, plus the additional sum of $302.01, with interest at 6% from August 20, 1960, and costs, and adjudging that defendants take nothing by their counterclaim. The action was brought by the plaintiff to recover a balance allegedly due and owing under a construction subcontract executed on September 29, 1958 with the defendants, plus additional amounts claimed for extra labor and materials furnished to defendants.

The District Court's jurisdiction was invoked under the provisions of Title 28 U.S.C. Sec. 1331, Title 28 U.S.C. 1332, Title 28 U.S.C. Sec. 1352, Title 40 U.S.C. Sec. 270 and Title 42 U.S.C. Sec. 1594. (Complaint, paragraph IV, pages 2 and 3.) The amount in controversy exceeds $10,000.00 and the action is between citizens of different states. (Complaint, paragraphs I, II, and III, pages 1 and 2.)

The appellate jurisdiction of this Court is founded upon the provisions of Title 28 U.S.C. Sec. 1291. Notice of appeal to this Court by the appellants and defendants was given and filed in the United States District Court for the District of Hawaii on December 27, 1961.

Statement of the Case

The District Court has made extensive Findings of Fact and Conclusions of Law setting forth the nature of this case. Since on this appeal defendants primarily urge that the District Court has erred in certain conclusions of law and defendants'

argument will require this Court's examination of the Findings of Fact and Conclusions of Law, they are now here set forth at length, in lieu of any other statement of the case:

"On December 4, 1957, invitations for bids for the construction of six hundred fifty (650) housing units at the United States Marine Corps Air Station at Kaneohe Bay, Oahu, T.H., for the Department of the Navy, Housing Contract No. NBy(CH)-12526 were sent to interested contractors. The bids, ultimately, were to be opened at 11:00 a.m. on Friday, January 31, 1958, at the District Public Works office at Pearl Harbor, Oahu.

"Among the interested contractors was the defendant, Richards Construction Company(1), and in the 'Builders Report of Hawaii' of January 20, 1958, appeared a half-page

---

"(1)The defendant Richards Construction Company-Kaneohe Bay Project is a general partnership consisting of the following defendants: (1) Bayrich, Inc., (2) Bayrich Inc. of California, (3) Barry J. Richards, Inc., (4) Barry J. Richards Co., and (5) Richards Construction Company, a limited partnership. This limited partnership is in turn made up as follows: (a) Barry J. Richards, an individual and a general partner, (b) Barry J. Richards, Trustee of the Barry J. Richards Trust for Susan Beth Richards, a limited partner, and (c) Gertrude Richards, Trustee of the Gertrude Richards Trust for Susan Beth Richards, a limited partner. The Massachusetts Bonding and Insurance Company was the surety on the bond on the general contract, said bond being issued for the protection of all persons supplying labor and materials used in the prosecution of the work on the contract. The Richards Construction Company by and through its general partner, defendant Barry J. Richards, caused to be formed defendant Richards Construction Company-Kaneohe Bay Project, a partnership, which partnership by and through all of its general partners undertook the performance of said building contract.

advertisement of the defendant requesting sub bids for the project. This advertisement showed the address of the Richards Construction Company to be 4811 Whitsett Avenue, North Hollywood, California, and also announced that the company's representative would be at the Surfrider Hotel on January 28, 29, 30 and 31. This advertisement was seen by Allen Arasato, foreman of the sheet metal department of the plaintiff.

"On January 30, 1958, the plaintiff filed a bid on Section 6 of the Housing Project Specifications: sheet metal work, at the figure of $48,733.00, with the General Contractors Association of Hawaii, and either on that day or on the morning of Friday, January 31, the same bid was telephoned to the defendant, Barry J. Richards, who was the general manager of all of the defendants' interests (except Massachusetts Bonding and Insurance Company), at the Surfrider Hotel by Arasato.

"The defendant[2], as a general contractor, had already secured bids from mainland United States contractors on this same item--one for $173,395.00 and another for $83,277.00. The defendant had been prepared to use an

---

"[2]Because of the complex make-up of the various 'Richards' partnerships, corporations, etc., the term 'defendant', as used throughout this decision, usually but not necessarily refers to the Richards Construction Company and on occasion to Barry J. Richards himself, inasmuch as he apparently was the sole manager of all of the 'Richards' operations.

$83,000.00 figure for the sheet metal work prior to receiving Arasato's call. Relying on Arasato's call and a reconfirming call in which Richards advised Arasato that he was using the plaintiff's figure as lowest on the sheet metal work, Richards adjusted his figures for the sheet metal work to $48,733.00 and on Friday, January 31, 1958, defendant Richards Construction Company by Barry J. Richards, general partner, submitted a bid of $8,794,085.00 for the entire project. When the bids were opened at 11:00 a.m. on that day, the defendant was the low bidder. The Saturday morning, February 1, 1958, Honolulu Advertiser carried the bid story.

"The plaintiff was not open for business on Saturday, February 1, but on Sunday, Arasato, knowing that the defendant was the low bidder and having been advised that defendant was using plaintiff's figure, rechecked the figures of the plaintiff's bid and discovered that plaintiff's employee, Albert Sakuda, the actual estimator, had mistakenly used labor and material costs on fabricating galvanized sheet metal whereas the job Specifications called for zinc alloy metal. Arasato immediately determined that the cost of zinc alloy was about twice that of galvanized sheet metal.

"On Monday morning, February 3, 1958, Arasato notified J. Q. Quealy, Jr., general manager of the plaintiff corporation, of the mistake. Although the

exact difference in cost was not at that time available, it was known to be considerable. Quealy immediately notified Arasato to contact the low bidder. Arasato was unable to contact Richards at the Surfrider Hotel, but made no attempt to contact defendant in California. Richards had returned to California and did not come back to Hawaii until March 3, when Richards found a memorandum that he should call Arasato at the plaintiff company. He called and, about March 6, Arasato, for the first time, saw Richards at the Surfrider Hotel to tell him that the plaintiff had made a mistake and 'would like to withdraw their figures.' The defendant 'blew up.' The next day the defendant saw Quealy at the plaintiff's office and Quealy advised him that the plaintiff was not going to do the job at the bid price.

"On March 11, the defendant wrote the plaintiff formally accepting its confirmed offer of January 30, 1958 to do the sheet metal work for $48,733.00. The plaintiff under date of March 25 wrote the defendant construction company that it did not consider itself under any contractual obligation to go through with its offer and claimed that its offer had been withdrawn.

"About a week later, Richards came back and discussed the possibility of using copper in place of zinc alloy. Whether this possible use of copper was initiated

by the defendant or by the Navy itself is not clear. In any event, figures for copper were secured in March of 1958. On July 14, 1958, Richards wrote to the District Public Works Office, Fourteenth Naval District, proposing changing all zinc flashings to 16 oz. copper and indicated that there would be an increase in cost. The plaintiff's estimated price for using copper was $96,000.00.

"There was some confusion as to when Richards again contacted the plaintiff requesting the plaintiff to work out a bid on the sheet metal work using zinc alloy. It may have been shortly before or after July 10, 1958, but in any event Richards came to the plaintiff in the summer of 1958 and said that he had endeavored to get prices from other contractors on sheet metal work using zinc alloy and that the Navy had refused to use copper and that he wanted the best possible figure from the plaintiff on a zinc alloy basis. The plaintiff gave to the defendant an offer to do the sheet metal work for $68,761.00. After some hard bargaining, the plaintiff reduced its figure to $62,000.00, and, under date of September 28, 1958, the plaintiff and the defendant entered into a formal written contract whereby the plaintiff agreed to do the sheet metal work on the project for $62,000.00.

"As the work progressed, the defendant paid the plaintiff a total of $50,582.70. Then, when the

plaintiff had completed its work, satisfactorily, the defendant company refused to pay any more. In addition to that, the plaintiff had performed extra work to the reasonable value of $302.01. This also the defendant refused to pay for. Suit was brought by the plaintiff for the above sums. The defendant counter-claimed alleging that the only contract price was $48,733.00, and that therefore the defendant had over-paid the plaintiff in the sum of $1,849.00.

"Both the plaintiff and the defendant companies have as their managers men who are ruthless in the pursuit of profit and neither Mr. Richards nor Mr. Quealy, Jr. impressed the Court with the accuracy of their respective statements. As the Court advised counsel in Chambers shortly after the trial had started, it clearly appeared to the Court that Barry Richards was parsimonious with the truth. Later, it was equally clear to the Court that the observation of the late Dr. Sigmund Freud that 'a person forgets what he wants to forget' might well be applied to the testimony of Quealy and certain other employees of the plaintiff. Defendant Barry Richards obviously is a tough and rough, smart, sharp general contractor who feels that the contracting business is one in which no holds are barred. Although the attitude of Quealy, Jr. was externally much more suave, the Court

was convinced that he too held the same general attitude toward the contracting business as does the more outspoken Mr. Richards. The Court was at all times faced with the task of sifting fact from fiction as well as forgetfulness that was tantamount to fiction.

"The first legal problem which the Court had to determine was whether or not a contract had been entered into between the plaintiff and the defendant at the $48,733.00 figure submitted by the plaintiff.

"There was testimony from Mr. Richards that he had twice checked with Arasato as to the accuracy of the plaintiff's figures and that, after he was notified that his construction company was low bidder, he had on that same afternoon of Friday, January 31, contacted Arasato and in effect accepted plaintiff's bid. This 'acceptance' is not supported by the Richards Construction Company letter of March 11, 1958 (Ex. 8) to the plaintiff and the Court therefore does not believe that plaintiff's bid was accepted on January 31, 1958.

"The plaintiff's contention is that, even though it filed its bid with the General Contractors Association and telephoned its bid to the defendant, it had no enforceable contract with the defendant company; that its bid amounted to a revocable offer; and that the plaintiff communicated its revocation to the defendant before the

defendant accepted it.

"Admittedly, the filing of the bid was not an option supported by a consideration nor on the state of the record would there appear to be a bilateral contract binding the defendant to use the plaintiff's bid. On the other hand, plaintiff's bid nowhere stated either expressly or impliedly that it was revocable at the pleasure of the plaintiff before acceptance. Ex. J, 'Important Principles of the Bidding Procedure of the General Contractors Association of Hawaii', showed the basis upon which the bid was filed, viz., that after the bid deadline the bidding procedure rules of the Association forbid a change in bidding figures and if a bid contains an error it must be withdrawn before the general bid opening. As the principles of the Association state: ' . . . The salvation of each member's business and the industry lies in abiding by the Bidding Procedure and playing the game in an honest way. . . .' The plaintiff's bid (Ex. 2) filed with the General Contractors Association of Hawaii had no limitation as to how long it would remain open. The space provided for fixing such a limitation was left blank. The plaintiff's bid constituted a promise on its part to do all of the sheet metal work according to the specifications. The plaintiff certainly had reason to expect that, if its bid was lowest, that bid would be used by the

defendant. Plaintiff's bid was intended to induce action of a definite and substantial character on the part of the promissee, Richards Construction Company, and it did. The Court is fully satisfied that Richards Construction Company advised plaintiff that it was going to use the plaintiff's figure in its bid on the sheet metal work, and that the defendant did so use it.

"Section 45 of the Restatement of the Law of contracts provides:

> 'If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in the response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration of being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.'

And Comment b. on that section states that:

> ' . . . The main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see Sec. 90).'

"The subsidiary promise serves to prevent the injustice which would result if the offer could be revoked after the offeree had acted in reliance thereon to its detriment and this foreseeable prejudicial change in position implies a subsidiary promise not to revoke an

offer for a bilateral contract.

"Section 90 of the Restatement of the Law of Contracts states:

> 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'

"This Court is of the opinion therefore that the plaintiff in making its bid of January 30, 1958 made a promise which it should have reasonably expected would induce the defendant to submit a bid based thereon to the Government, that such a promise did induce this action, and that an injustice would have been avoided only by enforcement of the promise. (See Drennan v. Star Paving Company, 333 P.2d 757.)

"Although there was some evidence that the defendant thought that the plaintiff's bid was too low and hence inferentially there was knowledge that the plaintiff had made a mistake in its bid, the Court does not believe that the defendant did have any knowledge, prior to March 6, 1958, that the plaintiff had made a mistake in its bid. There was a variance of $90,000.00 between two mainland bidders on the same sheet metal work and the difference between plaintiff's bid and the next above it was but $34,000.00. Also, the plaintiff's bid was $32,000.00 above the architect's estimate on the sheet metal work.

other for a minimal deficit.

Section 15 of the Constitution of Fiji provides:

> "A person must not engage in conduct which is likely to induce racial disharmony or to promote feelings of ill-will or hostility between persons of different races or classes, if the conduct is likely, in all the circumstances, to disturb the peace, order or good government of Fiji."

This Court is of the opinion that the plaintiff is making its case that the defendant's conduct was likely to induce racial disharmony or to promote feelings of ill-will or hostility between persons of different races or classes. The plaintiff must establish on the balance of probabilities that the defendant's conduct was likely to induce racial disharmony or to promote feelings of ill-will or hostility between persons of different races or classes. The plaintiff must establish on the balance of probabilities that the defendant's conduct was likely to induce racial disharmony or to promote feelings of ill-will or hostility between persons of different races or classes.

Although the Court is satisfied that later Richards told Quealy that he had been carrying a $62,000.00 figure on the sheet metal work, the Court was convinced that this was but a part of the several and mutual misrepresentations made by Richards and Quealy, Jr. to each other in the course of bargaining over the price for which the plaintiff ultimately agreed to perform the work. Neither the plaintiff nor the defendant exhibited very clean hands to the Court in their entire series of transactions. Both the plaintiff and the defendant were <u>out</u> to make as much profit as possible <u>out</u> of each other without regard to business ethics and 'good faith'.

"The Court finds therefore that an enforceable contract was entered into by the defendant with the plaintiff--not necessarily on March 11 when the defendant wrote his letter of acceptance--but certainly by March 6 on the very date when Arasato first told the defendant at the Surfrider Hotel that 'my man made a mistake and we would like to withdraw our figures.' It was clear to the Court and the Court so finds that upon that occasion Richards by his words and actions clearly indicated that he had relied upon the plaintiff's bid of $48,733.00, had used it in making his own bid as general contractor, and, by his words and actions with Arasato on that day and with Quealy on the following day, clearly indicated that he accepted plaintiff's bid.

"Immediately thereafter circumstances took place which are a little unclear to the Court. Although Richards testified that the idea of using copper originated with him, nevertheless his letter of July 14 to the District Public Works Office, Fourteenth Naval District (Ex. O) leads to the inference that the Naval District itself had requested Richards to evaluate a change of all zinc flashings to 16 oz. copper. The Court is satisfied from plaintiff's Exs. 21 and 22, viz., radiograms, that as early as March 12, 1958 Richards was calling upon the plaintiff for a modification of the contract by way of substituting copper for zinc.

"In August or September 1958, the problem confronting the plaintiff and defendant was crystalized. The defendant had to go ahead with his general contract. The plaintiff was refusing to perform on his $48,733.00 bid and contract. The defendant had tried to secure bids elsewhere but the lowest figure he could get was that of the Oahu Plumbing for $79,889.00.

"The defendant went back to the plaintiff and asked the plaintiff to rebid the job using zinc. Thereupon, the plaintiff tossed the purely 'guesstimated' bid of $68,761.00 to the defendant. The defendant, feeling that he was 'dealing with a chiseller', represented that he had a mainland bid of $62,000.00 and that he had allocated

that figure for the sheet metal work and was willing to pay plaintiff that much for the work if plaintiff would do it, and the plaintiff, with a great show of being fair and honorable, advised the defendant that, 'because he felt a moral obligation to do so', he would reduce the bid by the margin of his profit--ten per cent--and do the job 'at cost' for $62,000.00. In these respects the statements of neither the plaintiff nor the defendant were in the slightest degree true. It was in this frame of mind, and with the firm intention on the part of the defendant not to pay any more than he would be forced to because of work completion and by a court, that the plaintiff and the defendant entered into the contract of September 29, 1958 (Ex. 3) whereby the defendant agreed to pay the plaintiff $62,000.00 for doing the same job which the plaintiff had previously promised to do for $48,733.00.

"It is argued by the defendant that there was no consideration for this 'contract of September 29, 1958' and therefore it was unenforceable.

"This Court, having found that a contract between the plaintiff and the defendant was entered into in March 1958, and that the plaintiff refused to perform as promised, is of the opinion that if thereafter the defendant had awarded the contract for the sheet metal work to any person other than the plaintiff he could then have taken

legal action against the plaintiff for all of his costs in excess of the plaintiff's original bid. The defendant had these rights, but he did not choose to enforce them. Instead, in the fact of the plaintiff's refusal to perform as promised, the defendant went back to the plaintiff and as he said:

> 'I did my best to compromise the figure down to whatever possible figure I could get them (plaintiff) to perform . . . . '
>
> 'I would be glad to bring it (the sheet metal work) down to 48,000, 49,000 or 50,000 because of the amount of exposure I had. I was interested in getting the lowest possible bid I could with the amount of exposure I had . . . . '
>
> 'I have no intention of paying him (plaintiff) over that amount($48,733.00) or any reasonable amount over that that we might have to pay to keep him on the job . . . . '
>
> 'It's good business practice to get anything down to the lowest price . . . . '

Thus it was clear that the defendant entered into the formal contract of September 29, 1958, not for the purpose of mitigating damages for the plaintiff, but rather for the purpose and consideration of limiting his own company's exposure.

"As is set forth in the Restatement of the Law of Contracts, Sec. 406, Comment a., ' . . . Where, however, there is a bilateral contract, and each party is still subject to some duty thereunder, the agreement of each party to surrender his rights under the contract affords

sufficient consideration to the other for his corresponding agreement . . . . ' and Comment b., ' . . . if either party even wrongfully expresses a wish or intention to abandon performance of the contract, and the other party fails to object, there may be . . . circumstances justifying the inference that he assents . . . . ' It has been stated many times 'the right to contract includes the right to modify, change or abrogate a pre-existing contract and the mutual promises of the parties are sufficient to support the new agreement.' (Cases on all fours with the present problem of refusing to perform a pre-existing contract at any agreed price but subsequently performance at a new and higher agreed price are Bishop v. Busse, 69 Ill. 403; Cooke v. Murphy, 70 Ill. 96 (both decided by the same Judge). The same rule of law was applied in Grant Marble Co. v. Abbot (Wis.) 124 N.W. 264. The same principle was applied in Evans v. Oregon & W. R. Co. (Wash.), 108 Pac. 1095. It was also more recently followed in United States v. Slater (Alaska), 11 Fed. Supp. 418. As was said in Savage Arms Corp. v. United States, 266 U.S. 217, 220, 'the parties to a contract may release themselves, in whole or in part, from its obligations so far as they remain executory, by mutual agreement without fresh consideration. The release of one is sufficient consideration for the release of the other.' This rule

was applied in Borin Corp. v. Comm'r of Internal Revenue (6th Cir.), 117 F.2d 917, 920.)

"The Court finds that there was adequate consideration on both sides to support the formal contract of September 28, 1958 modifying the informal contract of March 1958. The plaintiff could not be compelled to do the sheet metal work (he was only liable for any damages suffered by the defendant). There had already been moves toward modifying the informal contract of March 1958 by substitution of copper and Richards himself stated that in entering into the formal contract of September 28, 1958 he was compromising his dispute with the plaintiff solely for the defendant's benefit. The Court finds therefore that the terms of that September contract were binding on both parties thereafter. The plaintiff having fully performed that contract is entitled to be paid in accordance with its tenor.

"Let Judgment be entered for the plaintiff against the defendants in the sum of $11,417.00, this being the remaining amount due under the contract, together with interest at the rate of six per cent per annum from July 25, 1960, that being the date on which the defendant was billed for same.

"In addition thereto, the Court finds that extras to the value of $302.01 were performed by the plaintiff

was applied in Doris Dodd, V. Dodd's 22 Divorced Fathers (1st Cir.), 117 F.2d 972, 980.)

The Court finds that there was adequate consideration on both sides to support the formal contract of September 26, 1958 modifying the informal contract of March 1958. The plaintiff could not be compelled to do the steel work (he was only liable for any damages sustained by the defendant). There was clearly room before modifying the informal contract of March 1958 by making of copper and Alexandria Material should enter entering into the formal contract of September 26, 1958 he was compromising his dispute with the plaintiff solely for the defendant's benefit. The Court finds therefore that the terms of these Agreements constituted valid binding on both parties thereafter. The plaintiff having fully performed them contends he entitled to be paid in accordance with its terms.

The Judgment be entered for the plaintiff against the defendants in the sum of $41,417.00, plus having the remaining amount due under the contract, together with interest at the rate of six per cent from July 26, 1960, that being the date on which the defendant was billed for same.

In addition thereto, the Court finds that there is due the value of $707.01 were purchased by the plaintiff

at defendant's request and that the plaintiff has not been paid for the same. Let Judgment be entered in favor of the plaintiff against the defendants in the additional sum of $302.01 on account of the extras, together with interest at the rate of six per cent per annum from August 20, 1960, that being the date on which the defendant was billed for the same.

"Defendants shall take nothing by their counterclaim.

"Costs will be allowed the plaintiff."

Specification of Errors Relied On

1. The District Court erred in holding that there was adequate consideration on both sides to support the formal contract of September 28, 1958 modifying the informal contract of March 1958.

2. The District Court erred in holding that the terms of the September contract were binding on both parties thereafter, and that plaintiff was entitled to be paid in accordance therewith.

3. The District Court's conclusions of law, as aforesaid, are not supported by the findings of fact, and are contrary to law.

Question Presented

Whether the contract of September 29, 1958, whereby the defendants agreed to pay plaintiff the sum of $62,000.00,

lacked consideration and was therefore unenforceable for the reason that, as the District Court has determined, the plaintiff had already entered into a binding and enforceable agreement to do the same job for defendants for the sum of $48,733.00.

Summary of Argument

By the great weight of authority, the agreement of September 29, 1958 -- which was but an agreement by the plaintiff to perform an already existing obligation at an increased price -- lacks consideration.

The District Court, in effect, has applied the minority rule followed in Massachusetts and a few other states based upon the reasoning that since plaintiff had the privilege to pay damages rather than perform the contract at the bid price of $48,733.00, the defendants received an additional consideration, namely, plaintiff's performance in lieu of a mere claim for damages against plaintiff when defendants agreed to pay the higher price of $62,000.00.

This reasoning has been disapproved by most jurisdictions, and has been heretofore squarely rejected by this Court in Alaska Packers' Assn. v. Domenico, 117 F. 99.

The agreement of September 29, 1958 cannot be properly considered to be a valid rescission or modification of the March agreement for the same reason that there was no valid consideration therefor.

There was no honest dispute between the parties herein concerning the binding effect of the plaintiff's bid and defendants' acceptance thereof as to justify a conclusion that the September 29, 1958 agreement was intended to be in settlement of said dispute.

ARGUMENT

I.

The agreement of September 29, 1958, because it was merely an agreement by the plaintiff to perform an already existing obligation at an increased price, lacks consideration.

It is fundamental that when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor.

This rule has been almost universally followed, and is the rule in Hawaii, as set forth in Magron v. Marks, 11 Haw. Repts. 764.

An exhaustive discussion on this question appears in Williston on Contracts, Third Edition (1957), Volume 1, Section 130, wherein it is stated:

> "Where A and B have entered into a bilateral agreement, it not infrequently happens that one of the parties, becoming dissatisfied with the contract, refuses to perform or to continue performance unless a larger compensation than that provided in the original agreement is promised him. Especially common is the situation where a builder or contractor undertakes work in return for a promised price and afterwards, finding the contract unprofitable, refuses to fulfill his agreement but is induced to fulfill it by the promise of added compensation. 'What we hold is that when a party merely does what he has already

The Secretary of Defense [illegible] to see
legally to intervene in the [illegible] to see [illegible]
political influence of [illegible] the [illegible]
to [illegible] that [illegible] [illegible] used [illegible] to
[illegible] politically [illegible] to do, [illegible] request
[illegible] [illegible].

[illegible] [illegible] [illegible], [illegible] to
[illegible] [illegible], [illegible] [illegible], [illegible],
[illegible] [illegible].

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible], [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible]

obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as nudum pactum, and will not lend its process to aid in the wrong.'

"On principle, the second agreement is invalid for the performance by the recalcitrant contractor is no legal detriment to him whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance under the second agreement a legal benefit to the promisor since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion. 'It is like carrying coals to Newcastle' to add authorities on a proposition so universally accepted and so inherently just and right in itself.'"

Williston, in the footnotes at pages 532 through 537, cites numerous decisions from many jurisdictions in a detailed treatment of this subject matter, and the Court's attention is respectfully referred thereto.

Williston, at Section 130A, goes on to point out the arguments which have been advanced to sustain such agreements, and demonstrates why such arguments are illogical and unsound, as follows:

"It has been said that the parties to the original agreement had either of them a privilege to subject himself to liability in damages if he preferred to pay damages rather than to perform the contract; and, therefore, it is contended, the surrender of the privilege to pay damages constituted a sufficient consideration. It is true that a promisor can refuse to perform his promises, and in most cases the only liability he incurs thereby is to pay damages, but this is far from saying that when one enters into a contract he in effect agrees to perform or pay damages at his option. Under ordinary contracts his duty is to perform the contract, and his co-contractor is entitled to the performance. Unless, therefore, he has reserved as an alternative in the contract the choice of making a money payment to the promisee he does not perform his legal duty by paying damages. Moreoever, even if it could be conceded that the original promise is to be regarded as merely an alternative undertaking either to perform or pay damages, the situation here under discussion would not be helped at least if the second agreement were bilateral; for the same interpretation would have to be put upon the second undertaking as upon the first. One who was previously bound to do certain work or pay damages based on its value is promising nothing detrimental to himself or

beneficial to the promisee when he again promises to do that very work or to pay damages necessarily identical in amount with those for which he was previously liable.

"The other ground suggested for supporting the subsequent agreement is the rescission theory, - that the first agreement is rescinded by the second, and being rescinded, each party, free from previous obligations, may enter into the new agreement. If the original agreement is still in part at least unperformed on each side it may be rescinded by mutual consent. If the original agreement is rescinded, a new agreement made thereafter on any terms to which the parties assent will be binding. Therefore, a rescission followed shortly afterwards by a new agreement in regard to the same subject matter would create the legal obligations provided in the subsequent agreement. It must further be conceded that when a second agreement is made which is intended by the parties as a substitution for the original contract, there is mutual assent to the rescission of the earlier agreement. <u>But calling an agreement an agreement for rescission does not do away with the necessity of consideration</u>, and when the agreement for recission is coupled with a further agreement that the work provided for in the earlier contract shall be

completed and that the other party shall give more than he originally promised, the total effect of the second agreement is that one party promises to do exactly what he had previously bound himself to do, and the other party promises to give an additional compensation therefor. If for a single moment the parties were free from the original contract so that each of them could refuse to enter into any bargain whatever relating to the same subject matter, a subsequent agreement on any terms would be good. The situation is not different from that existing where one subject to a unilateral obligation undertakes instead of merely performing that obligation to do something additional, nor indeed from that where one subject to no liability voluntarily agrees to assume one.

"In a few cases a distinction has been made and it is held that 'where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid

consideration.' The difficulty with this suggestion is that the unknown and unanticipated difficulties generally do not excuse the contractor from fulfilling his original contract. Accordingly in acting under the second offer, the contractor is merely doing or promising to do something which at the time he was under obligation to do, and which the promisee was entitled to receive." (Emphasis added.)

Research has failed to disclose any case decided in the Territory or the State of Hawaii involving the precise factual situation here presented.

However, this Court has heretofore itself considered the problem and has adopted the majority rule as set forth by Williston.

In Alaska Packers Association v. Domenico, (CAA 9th), 117 F.99, the plaintiffs had contracted to perform their services as sailors in navigating a vessel from San Francisco to a salmon canning plant in Alaska, and in catching and canning salmon while there, during the season, for which they were to receive a stipulated compensation. After reaching the plant, they refused without cause to further perform the contract unless the defendant's superintendent signed an agreement to pay additional compensation. He stated that he had no authority to do so, but being unable to procure other men, owing to the remoteness of the place and the shortness of the

season, he complied with their demand and a second contract was signed, identical with the first except as to the compensation to be paid.

The District Court, in an opinion reported in 112 F. 544, granted judgment for the plaintiffs upon the same theory (as stated by the District Court in this case) that the plaintiffs had a right to refuse to perform their contract and to pay damages for such refusal, and that the new contract therefore was based upon a good consideration to the defendant because it secured performance from the plaintiffs.

This Court, on appeal, rejected this reasoning and followed the reasoning set forth by Williston, at Section 130 above quoted, and in the course of its opinion quoted extensively from Lingenfelder v. Brewing Co., 103 Mo. 578, 15 S.W. 844, also relied upon by Williston at page 532.

The rule adopted by this Court in Alaska Packers Association v. Domenico (and the view advocated by Williston) was again referred to and quoted with approval by this Court in Power Service Corporation v. Joslin, (1949), 175 F.2d 698, and the Court's attention is respectfully referred thereto, including particularly the discussion at pages 701 and 702. In the Power Service Corporation case, which also involved a construction project where a bid was made and accepted prior to the execution of a formal contract between the parties, this Court held that the terms of the contract became fixed

when the bid was accepted, notwithstanding that a formal contract was not executed. The question involved was whether defendant was liable for damages resulting to the plaintiff from the defendant's failure to furnish necessary materials to install boilers within a specified time. The specifications which formed a part of the proposed contract upon which the bid was submitted relieved the defendant from any such liability. However, when the formal contract was executed, a rider was attached thereto at the request of the plaintiff which the plaintiff contended imposed liability upon the defendant for damages resulting from delay. This Court held that said rider, if it purported to impose liability upon the defendant, was ineffective because it could not alter the effect of the original specifications since there was no new consideration to support it.

So in the case at bar, and as the District Court has held, although the parties undoubtedly contemplated the ultimate execution of a more formal writing, the acceptance by the defendants of the plaintiff's bid resulted in a binding contract.

The change in the September 29, 1958 contract to a price of $62,000.00 could not validly affect the price of $48,733.00 contained in the bid and the contract resulting therefrom.

II.

The agreement of September 29, 1958, cannot be properly considered to be a valid rescission or modification of the March agreement for the same reason that there was no valid consideration therefor.

The District Court herein has not expressly found, as a matter of fact, or concluded as a matter of law, that the March, 1958 agreement was rescinded by the parties. Rather, as the Court's findings indicate, its holding is based upon the premise "that there was adequate consideration on both sides to support the formal contract of September 29, 1958 modifying the informal contract of March, 1958."

However, before so stating, the District Court quoted from Section 406 of the Restatement of the Law of Contracts which does treat generally with the question of the discharge of a contract by rescission.

That portion of the Restatement to which the District Court refers discusses the subject matter generally, and is limited or qualified by Section 408 thereof which follows, and which deals specifically with the situation here presented. Section 408 is entitled "Discharge of Duties under an Earlier Contract by a Subsequent Inconsistent Contract", and provides:

"A contract containing a term inconsistent with a term of an earlier contract between the same parties is interpreted as including an agreement to rescind

The judgment of December 15, 1994 cannot be regarded as to be a valid revision or modification of the Third Agreement for the same reason that there is no valid consideration therefor.

the inconsistent term in the earlier contract. The parties may or may not at the same time agree to rescind all the other provisions of the earlier contract. Whether they do this is a question of interpretation, except as this rule is qualified by the rule stated in Sec. 223."

This section is the controlling section, insofar as the case at bar is concerned, because here the September contract contains only one term which is inconsistent with the terms of the earlier contract, namely, the price to be paid.

But, the Restatement, under Section 408, goes on to make the following comment:

"It is essential under the rule stated in the Section that the second agreement complies with the requisites for the formation of contracts. Therefore a promise by one party simply to perform all or a part of what he promised in the original contract will not support a promise by the other party to perform what he previously agreed to and something additional (see Sections 76, 78)." (Emphasis added.)

This is precisely the situation here involved, and therefore, under the reasoning adopted by the Restatement, it cannot be assumed that the execution of the September contract constituted a voluntary rescission or modification of the March contract.

In this respect, the language quoted by this court in Alaska Packers Association, supra, at 117 F., pages 102 and 103 is squarely applicable:

> "'No astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong, where the promise is simply a repetition of a subsisting legal promise. There can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. The promise cannot be legally enforced, although the other party has completed his contract in reliance upon it.'" (Emphasis added.)

The District Court's findings of fact state that the defendant Mr. Richards "blew up" and protested violently when advised that plaintiff wished to withdraw its bid, and there is no basis for assuming that the defendant intended or agreed to

rescind the March, 1958 agreement.

As pointed out by Williston, supra, at page 540, "calling an agreement an agreement for rescission does not do away with the necessity of consideration, and when the agreement for rescission is coupled with a further agreement that the work provided for in the earlier contract shall be completed and that the other party shall give more than he originally promised, the total effect of the second agreement is that one party promises to do exactly what he had previously bound himself to do, and the other party promises to give an additional compensation therefor."

Similarly, under the circumstances of this case, it cannot properly be concluded that there was a valid consideration to sustain a modification of the informal contract of March, 1958, as held by the District Court.

As Williston points out, except for a contrary view which prevails as a matter of common law or statute in a few jurisdictions (Williston, page 536, footnote 6) the modification of a contract requires consideration, and a promise by one party to perform what he previously contracted for is not sufficient to support a promise to be chargeable with the additional item (see footnotes, Williston, page 535).

This basic concept, that modification of a contract in itself must be supported by a valid consideration, underlies this Court's decision in the Alaska Packers Association case,

supra, and has generally been required by the Federal courts. In Cuneo Press v. Claybourn Corporation, (CAA 7th), 90 F.2d 233, at 235, it is stated:

"Modification of a contract by subsequent agreement is subject to the rules governing all contracts. Consequently any promise therein contained to do that which one is already obligated to do confers no advantage on the promisee, imposes no detriment on the promisor and is without consideration. 1 Williston on Contracts (1936) Sec. 130; 1 Page on Contract, Sec. 589; Alaska Packers' Ass'n v. Domenico, 117 F. 99 (C.C.A.9); Empire State Surety Co. v. Hanson, 184 F. 58 (C.C.A.8); Frankfurt-Barnett Co. v. William Prym Co., 237 F. 21 (C.C.A.2); In re American Range & Foundry Co. (D.C.) 14 F.(2d) 466; Brunswig Grain Co. v. Anchor Grain Co., 10 F.(2d) 304 (C.C.A.5); G. S. Johnson Co. v. Nevada Packard Mines Co. (D.C.) 272 F. 291. In other words, consideration is necessary to support a waiver or release of rights whether accomplished by an original instrument or by a modification of an existing contract. Frankfurt-Barnett Co. v. Prym Co., 237 F. 21 (C.C.A.2); Empire State Surety Co. v. Hanson, 184 F. 58 (C.C.A.8); Weed v. Spears, 193 N.Y. 289, 86 N.E. 10; Goldsborough v. Gable, 140 Ill. 269, 29 N.E. 722, 15 L.R.A. 294."

The other cases relied upon by the District Court in support of its legal conclusions either represent the minority

view which this Court has refused to follow, or contain factual aspects not present in the case at bar.

For example, Bishop v. Busse, 69 Ill. 403 and Cooke v. Murphy, 70 Ill. 96, follow the rule that the party agreeing to pay a higher price is deemed to receive an additional consideration by way of performance as distinguished from being relegated to a claim for damages. It is to be noted, however, that the rule in said cases was held in Moran v. Peace, 72 Ill. App. 135, at page 139, to be "in conflict with the later as well as previous decisions of the same court, and therefore, overruled by the later cases above cited."

Grant Marble Co. v. Abbot (Wis.), 124 N.W. 264, actually involved a situation wherein the plaintiff sought reformation or rescission of a contract, and the Wisconsin court held that no case for reformation or rescission had been made out by the plaintiff.

Evans v. Oregon & N.P.R. Co. (Wash.), 108 P. 1095, also follows the minority rule rejected by this court in Alaska Packers Association, supra.

In this respect, it appears that the Supreme Court of Washington has now joined the majority. See Westland Construction Co. v. Cris Berg, Inc., 215 P.2d 683, involving a situation where a plastering contractor entered into a valid contract for the plastering of certain houses and contended that it had erred in making the bid. It claimed that a subsequent agreement

was made whereby the contractor was to do the same work for a higher price. The Washington Supreme Court held that such a subsequent agreement would have been void because without consideration (215 P.2d, at page 690).

United States v. Slater, 111 F. Supp. 418, cited by the District Court does not involve the factual situation here presented, but instead, involved a case wherein the contractor had performed additional work over and beyond that originally called for. The Court held that the contract had been modified to permit him to recover for the extra work involved.

Savage Arms Corp. v. United States, 266 U.S. 217, 220, and Borin Corp. v. Commissioner of Internal Revenue, 117 F.2d 917, 920, are also not analagous to the case at bar for the reason that in those cases there were express agreements or understandings between the parties that the parties were releasing each other from claims against one another. In the case at bar, there is no evidence of any express agreement to mutually release one another from any claims arising out of the March, 1958 contract nor has the District Court in this case purported to so find or hold.

The District Court, in its findings, dwells at length on the discussions which took place concerning the possibility of changing the specifications to substitute copper in place of zinc alloy in the sheet metal work. No change resulted from these discussions. The mere fact that these discussions were

had does not affect the fact that there was a binding contract as the result of the bid and acceptance in March, 1958, and that the September contract did not purport to substitute copper instead of zinc alloy. The discussions concerning the possible use of copper had no bearing on the contractual obligation which arose in March, 1958, or on the effectiveness of the subsequent September formal agreement. Had copper been substituted in the contract as signed, then of course there would have been a valid and enforceable change from the March contract.

III

There was no honest dispute between the parties herein concerning the binding effect of the plaintiff's bid and defendants' acceptance thereof as to justify a conclusion that the September 29, 1958 agreement was intended to be in settlement of said dispute.

A fair and reasonable interpretation of the District Court's findings of fact and conclusions of law demonstrates that the Court's conclusions and judgment are predicated upon the legal premise and view that the performance obtained by defendants under the contract of September 29, 1958 constituted adequate consideration for said contract and the modification of the March contract purportedly accomplished thereby.

The Court does not in its findings of fact find that the September contract was in settlement of a bona fide dispute. The Court, however, does, in closing, make reference to the testimony of Mr. Richards "that in entering into the formal contract of

September 29, 1958, he was compromising his dispute with the plaintiff solely for the defendant's benefit."

The term "compromise" as used in this statement by the Court, and as used in other quotations in the Court's findings from the testimony of Mr. Richards, had reference to the negotiations which took place between Mr. Richards and plaintiff's representative concerning the additional price at which plaintiff would do the work, and not from the standpoing of compromising any dispute between the parties as to the validity of the March contract based upon the bid made by plaintiff and defendants' acceptance thereof.

The findings of the Court demonstrate that from the very first time that plaintiff's president Mr. Queaiy, Jr. met Mr. Richards, the question was not whether there was a valid binding contract between plaintiff and defendant -- the sole question was whether or not plaintiff was going to perform at the price bid. As Mr. Quealy testified, as to the substance of his first conversation with Mr. Richards (Tr. p. 225):

> "I told Mr. Richards of the mistake that we had made, of the efforts we had made in trying to reach him. I told him <u>that it would be impossible for us to perform the work on the basis of our quotation</u>, and that in doing so we would sustain a substantial loss to our firm and we could not stand such a loss." (Emphasis added.)

The discussions which later took place between them, resulting in the $62,000.00 figure, was not for the purpose of

compromising any dispute as to plaintiff's obligation to do the work for the bid price, but to see at what price plaintiff would perform. As Mr. Richards testified on cross-examination (Tr. p. 423):

"My frame of mind all along, Mr. Cox, was to get them to perform at the price they quoted to me, and if I couldn't, to get it at the next lowest price and to seek whatever recourse I could to compensate me for any loss that I incurred."

And, at page 420:

"When we agreed on this amount of $62,000 I was at no time happy or pleased about it. And I took it and stated at the time that they had me over a barrel and I had no other choice since it was the lowest possible figure I could get."

CONCLUSION

Defendants do not dispute their liability to plaintiff for the extras in the amount of $302.01 awarded plaintiff by the judgment of the District Court in this case. However, for all of the reasons aforesaid, defendants respectfully submit that the liability on the basic subcontract should be limited to the sum originally agreed on by the plaintiff, namely, $48,733.00, and that the judgment of the District Court should be reversed with instructions to render judgment in favor of defendants and against plaintiff on defendants' counter-claim to the extent

that defendants have over-paid plaintiff, after giving plaintiff credit for the extras above referred to.

Respectfully submitted,

A. WILLIAM BARLOW
and
SANDLER & ROSEN

By
Raymond C. Sandler
Attorneys for Appellants

435 North Bedford Drive
Beverly Hills, California

that defendants have overpaid plaintiff, after giving plaintiff
credit for the excess above required to.

Respectfully submitted,

A. [illegible] BAUER
and
[illegible] & BAUER

By
Raymond C. Bardier
Attorney for Appellants

435 North Bedford Drive
Beverly Hills, California